IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Ninth Circuit affirming the conviction of the petitioner of six charges arising out of his alleged efforts to forge and utter stolen U.S. treasury checks and possession of stolen mail (A. 19-21) is reported in *United States v. Barnes*, 466 F.2d 1361.

JURISDICTION

The judgment of the court of appeals (A. 19-21) was entered August 22, 1972 and a petition for a writ of certiorari was filed on September 21, 1972. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. §495 Contracts, deeds, and powers of attorney:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited–

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Title 18 U.S.C. §1708 Theft or receipt of stolen mail matter generally

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card,

package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein; which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. As amended May 24, 1949, c. 139, § 39, 63 Stat. 95; July 1, 1952, c. 535, 66 Stat. 314.

QUESTIONS PRESENTED

1. Was the evidence sufficient to show that defendant had in his possession stolen mail which he knew was stolen?

2. Was there error in giving the jury instructions that possession of recently stolen mail gives an inference that the person in possession knew the property had been stolen?

3. Was the evidence sufficient to show that the defendant had forged or uttered the checks?

4. Does the conviction of forgery and uttering constitute double punishment for the same offense?

STATEMENT OF THE CASE

A. Facts

The appellant JAMES EDWARD BARNES, hereafter to be referred to as the defendant, was indicted on July 8, 1971, on an eight count indictment, but was convicted of the following six counts only:

Count One, for having unlawfully a letter in his possession addressed to Nettie Lewis which he knew was stolen.

Count Four, having a letter addressed to Mary O. Hernandez which he knew was stolen.

Count Five, That he wilfully forged a United States Treasury Check dated July 1, 1971, in the amount of $269.02, payable to Nettie Lewis.

Count Six, that defendant uttered and published a United States Treasury Check which defendant knew was forged.

Count Seven, that defendant forged a United States Treasury Check dated July 3, 1971, in the amount of $268.80, payable to Mary O. Henandez.

Count Eight, that defendant uttered and published a United States Treasury Check for $268.80.

Trial by jury in this case commenced before the Honorable David W. Williams on November 16, 1971 (A. 1).

At the beginning of the trial, a Stipulation (A.5 & 6) was received in evidence and thereafter read to the jury as follows:

"That on or about July 1, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 43,495,044, in the sum of $269.02 to Nettie Lewis at 10031 Sunnybrae Avenue, Chatsworth, California 91311;

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 20,461,930, in the sum of $154.70 to Albert W. Young at P.O. Box 6525, Los Angeles 55, California 90055;

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 65,072,365, in the sum of $184.00 to Arthur O. Salazar at P.O. Box 5737 Metro Sta., Los Angeles, California 90055; and

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 92,566,712, in the sum of $268.80 to Mary O. Hernandez for the children of Alfred P. Hernandez at P.O. Box 5034, Los Angeles, California 90055" (A.5-6)

After the above Stipulation was read to the jury, the Government called to the witness stand all four of the respective payees of the above four U.S. Treasury Checks that were stipulated to being mailed.

Defendant admitted having possession of the checks, but denied that he knew they were stolen and denied the forgery or uttering of these checks.

Defendant claimed he received the checks from third parties who were his part-time salesmen for his used furniture store. He admits the second endorsement of "Clarence Smith" on the checks, but denied forging the names of the payees on the drafts. (A. 12-14)

The case was tried before a jury in the Courtroom of the Honorable David W. Williams, United States District Judge, on November 16 and 17, 1971. The defendant did not take the witness stand to testify in the course of the trial. [U.S.D.C., Central Div. #8572-CD]

On November 17, 1971, the jury returned a verdict of guilty on six counts of the eight-count indictment. The defendant was sentenced to imprisonment for a period of three years (A. 8)

SUMMARY OF ARGUMENT

The evidence was insufficient to show that the defendant had in his possession the stolen mail which he knew was stolen.

Further, the giving of the jury instructions that possession of recently stolen mail, gives an inference that the person in possession knew the property had been stolen, was in error and violated defendant's constitutional right in that it created an inference of his guilt in violation of the Fifth and Sixth Amendment. There must be a rational connection between the facts proved and the facts presumed.

Here, the inference is arbitrary and lacks connection in common sense to equate an inference that possession equals knowledge.

That the inference of guilt (from failure of defendant to testify) as a practical matter tends to shift the burden to the defendant and however piously we may state to the jury this is wrong.

The delivery of the "unexplained possession" instruction in this case, however, went too far towards circumscribing the appellant's constitutionally protected

privilege to remain silent during his trial. The appellant having been charged with the offense of possession, it is altogether possible that when the jury heard the "unexplained possession" charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the checks and that this obligation could be satisfied only through the trial testimony of the appellant.

We request the court to again reconsider the inference for it clearly establishes the burden of proof. The key test would appear to be as follows: that where the defendant did not testify or take the stand and this inference instruction is given, is there enough evidence to convict him?

If the answer to this question asked is in the affirmative, then defendant's failure to take the stand is apparently held against him; which would clearly violate the Fifth and Sixth Amendments to the Constitution.

Here, just as in the "*Cameron* case" the giving of the "unexplained possession of recently stolen property" charge to the jury in this case prejudiced the substantial rights of the defendant in two respects:

(1) It permitted the jury to infer the facts of knowledge, one element of the offense, from the fact of possession, the other element of the offense and

(2) It improperly infringed the appellant's privilege against compulsory self-incrimination under the Fifth Amendment to the United States Constitution.

With regards to the first point, the "unexplained possession" charge clearly had the effect, whether intended or not, of enabling the United States to pyramid the requisite element "knowledge" on top of the

requisite element of "possession" without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the checks.

Therefore, the "unexplained possession" instruction substantially prejudiced defendant's rights.

That from the jury instructions inferences are deductions from facts which have been established by evidence.

The combination of instructions created a limitation on the Fifth Amendment by creating facts which the defendant cannot rebut unless he takes the witness stand. At the risk of being provintial, the enlightened State of California does not have any similar jury instruction which equated knowledge to possession. This writer hopes the court will strike down this inference under the Fifth and Sixth Amendment.

Further the conviction of forgery and uttering constitutes a double punishment for the same offense and is a cruel and unusual punishment under the Eighth Amendment.

The government has never replied in their prior briefs to cruel and unreasonable punishment argument of appellant. Certainly the people could elect after a conviction whether this was forgery or an uttering rather than have the defendant convicted of two additional counts.

Certainly the greater (here forgery) includes the lesser, uttering and it would seem a cruel and unusual punishment to convict the defendant for both. If a person commits a murder, he also commits an assault and battery and a host of other crimes incidental thereto; and in that case, the greater includes the lesser. It would seem that this logic should also apply to this case.

The government, however, argues that this does not make a difference when defendant is convicted on multiple counts if he is sentenced as to only one and that it is unnecessary for the court to consider this point.

This argument seems ludicrous where a person has to put all his convictions on a job application and if he is in violation of his parole, he may now have to face a harsher sentence because of his conviction on multiple counts.

"We, therefore, conclude that the 'unexplained possession' instruction in the context of this case, substantially prejudiced the appellant's rights and accordingly we request the matter be sent back to the district court for a new trial."

Further, lumping together the charges of possession, forgery and uttering, is like putting sugar in coffee, for it is difficult for the jury to separate; therefore, a new trial is requested. Further the defendant was denied equal protection by the failure of the government to supply him with an independent handwriting expert.

ARGUMENT

I.

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT DEFENDANT HAD IN HIS POSSESSION STOLEN MAIL WHICH HE KNEW WAS STOLEN?

The jury was instructed (A. 15-16) as follows:

"Title 18, United States Code, Section 1708 provides in part:

"Whoever . . . has in his possession any letter . . . or any article or thing contained therein, which has been stolen, taken, embezzled or abstracted . . . knowing the same to have been stolen, taken or embezzled or abstracted . . . [shall be guilty of an offense against the United States Government.]"

Defendant was putting these drafts in his own account at the Crocker Citizens Bank, and since defendant did not take the witness stand, there is no proof to show, in Counts One and Four, that he knew the items were stolen from the mails.

Defendant submits that the Government is required to prove that defendant knew the items were stolen from the United States Mail.

On the above issue, there is a marked split of authority. A few cases are: *United States v. Weeks,* 327 F.2d 656 (2d Cir. 1964); *United States v. Hines,* 256 F.2d 561 (2d Cir. 1958); *Smith v. United States,* 343 F.2d 539, 543 (5th Cir. 1965); *Wilburn v. United States,* 327 F.2d 656 (5th Cir. 1964).

The better reasoned cases, however, hold that the prosecution must establish that the defendant knew the items were stolen from the United States Mail. *Allen v. United States,* 387 F.2d 641, 642; *Webb v. United States,* 347 F.2d 363, 364 (10th Cir. 1958).

The problem with the line of cases starting with *United States v. Weeks,* 327 F.2d 656, *supra,*, is that they do not require the accused to know that the articles were stolen from the United States Mail, but only, that the articles were stolen.

What we run into is the dual sovereignty concept between the State and Federal governments. The only way to properly tie in Federal jurisdiction is to require that the defendant knew these articles were stolen from the United States Mail.

It is apparent in this case that around July 1, 1971, certain checks were taken from the mail, but there is *no* proof that defendant took those items from the mail. His

defense is that certain parties gave him these checks as payment for furniture. (A. 12-13)

There is no showing that defendant or anyone who worked with him obtained these items from the mails. There are a hundred and one ways the defendant could have obtained these items other than the mail. Defendant did not take the witness stand, so there is no way to show he knew those items were stolen from the mail. He could have been given the checks by other persons, or he could have found the checks.

If defendant were caught taking the checks, or found with the envelopes and the checks, then this would certainly comply with the 18 U.S.C. 1708, and also if a conspiracy were shown to steal mail and defendant aided in this conspiracy.

Here there is no evidence to show that the defendant knew that these articles were stolen from the United States mail, but also, there is no evidence to show that defendant knew the mail was stolen. The fact that an inference that items were recently stolen from the mail is insufficient to show knowledge either that the defendant knew the items were stolen from the mail or that they were stolen.

Further in this case there were no confessions or admissions, and the defendant did not take the witness stand; and, therefore, the convictions as to possession of stolen checks should be reversed.

II.

WAS THERE ERROR IN GIVING THE JURY INSTRUCTIONS THAT POSSESSION OF RECENTLY STOLEN MAIL GIVES AN INFERENCE THAT THE PERSON IN POSSESSION KNEW THE PROPERTY HAD BEEN STOLEN?

The jury was instructed by the Court as follows:

Court's Instruction (A. 16)

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. If it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen, depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that, while recently stolen, the contents of said mail here, the four U.S. Treasury Checks, were in the possession of the

respective defendant, you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property; unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that, in the exercise of constitutional rights, the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." [Citations omitted].

The question here is: "Does such an instruction violate the *Fifth* and *Sixth Amendments* to the *Constitution of the United States,* where the defendant did not take the witness stand?

[Fifth Amendment] "Right to Protection of Persons and Property."

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[Sixth Amendment] "Rights of Persons Accused of Crime"

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." [Sixth Amendment] [Bill of Rights . . . The Constitution of the United States, December 15, 1971.]

It is safe to state that prior to *United States v. Leary*, 395 U.S. 6, that this inference was allowed.

Even after the *Leary* case, *supra*, some courts have followed *Clavin v. United States*, 396 F.2d 725, including the Ninth Circuit, again, in *United States v. Gardner* (January 10, 1972). See also: *McAbee v. United States*, 434 F.2d 363; and *United States v. Prujansky*, 415 F.2d 1045 (1967), which allowed this inference.

The appellant herein again requests the court to reconsider this matter in the light of the *Leary* case.

In the opinion of the Court in that case (*Leary, supra*), the Court states:

"The Court, relying upon a prior decision in a civil case, held that the 'controlling' test for determining the validity of a statutory presumption was 'that there be a rational connection between the facts proved and the facts presumed.' [Quoting in their opinion, the case of *Tot v. United States*, 319 U.S. 463 (1943)] the Court stated [in the *Tot* case, *supra*]:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.' " 319 U.S., at 467-468 (footnotes omitted).

Then at page 36 Opinion in the *Leary* case, *supra*, the Court further stated:

" 'Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—the inference of the one from proof of the other is arbitrary . . .' " *Tot v. United States*, 319 U.S. 463, 467. *Ibid.*

"The upshot of Tot, Gainey, and Romano is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." [*Leary, supra*, 395 U.S. at p. 36]

See also: *Rodgers v. United States*, 402 F.2d 839, 834 (9th Cir.) in which the Court said:

"Possession of a stolen car within a state is not a federal offense. The government has a heavy burden of proof in a criminal case; the defendant has none. The inferences (they are sometimes called presumptions) arising from possession relieve the government of much of that burden. As a practical matter, they tend to shift the burden to the defendant, however, piously we may say and tell juries that they do not. Therefore, when the government's case includes an 'explanation', the apparent validity of which is not offset by any substantial evidence, we think that the government is no longer entitled to the inference—it has not really met its heavy burden of proof."

Appellant feels that this case can be distinguished from the case of the *United States v. Gardner* (9th Cir. 1972), 454 F.2d 534. In that case the checks were placed in a mail box on June 11, and the very next day defendant Gardner took them to the bank. The present case differs, in that the facts set forth in the Gardner case do not apply for the checks in the present case were taken on July 1st and 3rd and were placed in defendant's own bank account on July 8th. Further, we request the Court to again reconsider the inference, for it clearly establishes the burden of proof. The key test would appear to be as follows: That where the defendant did not testify or take the stand and this inference instruction is given, is there enough evidence to convict him? If the answer to the question asked is in the affirmative, then defendant's failure to take the stand is apparently held against him; which would clearly violate the *Fifth* and *Sixth Amendments* to the *Constitution*.

The court in the *Rodgers* case, *supra*, indicates that that inference [of guilt for failure to testify], as a practical matter, tends to shift the burden to the

defendant, however piously we may state to juries that this is wrong.

See also *U.S. v. Cameron*, 460 F.2d 1394, in which case the court said:

"II. THE CONVICTION UNDER COUNT 1

"Over the objection of appellant's counsel, the district judge charged the jury, in part, as follows:

'Now, there was some evidence here that money taken from the Brooks Field National Bank had been recently stolen. Possession of property recently stolen if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew that the property had been stolen. Ordinarily the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property. The term "recently" is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may be reasonably drawn from unexplained possession.

'Of course, there is no evidence in this case, and the government does not contend, that Mr. Cameron stole any money, that he had anything to do with stealing any money from the Brooks Field National Bank. If you find beyond a reasonable doubt from the evidence in the case that the money described in the indictment was stolen and that while recently stolen the property was in the possession of the accused, you may, from these facts, draw the

inference that the money was possessed by the accused with knowledge that it had been stolen, unless possession of the recently stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in the case. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of Constitutional rights the accused need not take the witness stand and testify. There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of a defendant.

'You will always bear in mind, ladies and gentlemen, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property. I don't tell you that you have to draw "an inference." I simply say that you may do it if you wish to do it. In the final analysis, whether you draw an inference or whether you don't draw an inference is exclusively within your province.

'If any possession the accused may have had of recently stolen property is consistent with innocence or if you entertain a reasonable doubt as to the guilt of the defendant, you must acquit the accused. I am not suggesting to you that the defendant has possession of the money. This is also for you to find, but I give you the law for you to use as a guide in making a determination in your own mind as to the guilt or innocence of the defendant under the law.

'In the district court, counsel for the appellant argued with persistance and vigor that the above instruction infringed his client's Fifth Amendment privilege against self-incrimination. Cameron elected not to testify during the trial. Here the appellant presents a similar Fifth Amendment argument pertaining to the instruction. The United States counters by referring us to three of our decisions dealing with prosecutions under the Dyer Act, Title 18, U.S.C. Section 2311 *et seq.*: *Hale v. United States*, 410 F.2d 147 (5 Cir. 1969), cert. denied 1970, 396 U.S. 902, S.Ct. 216, 24 L.Ed.2d 179; *Welch v. United States*, 386 F.2d 189 (5 Cir. 1967), and *Brown v. United States*, 342 F.2d 419 (5 Cir. 1965).

'Unlike Section 2113(c), the Dyer Act[5] does not prescribe the "possession" of a stolen motor vehicle or aircraft. The accused in *Hale, supra*, was charged with the interestate transportation of a stolen vehicle; in *Welch, supra*, the accused was alleged to have received stolen motor vehicle; and in *Broom, supra*, the accused was charged with the sale of a stolen automobile. In each of these three cases, we held that the trial court did not err in instructing the

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[5] Title 18, U.S.C. §2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, U.S.C. §2313 provides:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

jury as to the inference which it could draw from the unexplained possession of recently stolen property.

'In the case *sub judice,* however, the appellant was charged with the knowing possession of currency stolen from a federally-insured bank. The United States was required to prove, beyond a reasonable doubt, that the appellant possessed the bills in question and that he knew that the bills were stolen when he had them in his possession. We believe that the delivery of the "unexplained possession of recently stolen property" charge to the jury in this case prejudiced the substantial rights of the appellant in two respects: (1) it permitted the jury to infer the fact of knowledge, one element of the offense, from the fact of possession, the other element of the offense; and (2) it improperly infringed the appellant's privilege against compulsory self-incrimination under the Fifth Amendment to the United States Constitution.

'With regard to the first point, the "unexplained possession" charge clearly had the effect, whether intended or not, of enabling the United States to pyramid the requisite element "Knowledge" on top of the requisite element of "possession" without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the checks. We have heretofore approved the use of such an instruction only where the defendant has been charged with an offense other than the possession of stolen property, such as the receipt, transportation, concealment, or sale of the item or items involved. Phrased simply, we are unwilling to approve the delivery of such an advice to the jury where, as in this case, the accused is alleged to have violated the

law by "possessing" stolen property, such as currency. Upon retrial the jury may be told that the two elements of the offense are possession and knowledge, but not that one may be inferred from the other.

'Our second basis of reversal as to Count 1, having to do with the appellant's Fifth Amendment privilege against compelled self-incrimination, is clearly related to the first basis just explicated. Our Dyer Act and other decisions approving the use of the "unexplained possession" instruction have implicitly recognized the tension between the language of the instruction and the accused's privilege not to testify at his own trial. We have resolved this tension by emphasizing the difficulty in proving the essential element of "knowledge" in most cases involving stolen goods and by pointing out that possession of recently stolen property was susceptible of explanation by means other than the trial testimony of the defendant. The delivery of the "unexplained possession" instruction in this case, however, went too far towards circumscribing the appellant's constitutionally protected privilege to remain silent during his trial. The appellant having been charged with the offense of possession, it is altogether possible that when the jury heard the "unexplained possession" charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the checks and that this obligation could be satisfied only through the trial testimony of the appellant. We conclude that the "unexplained possession" instruction, in the context of this case, substantially prejudiced the appellant's rights and accordingly we set aside the judgment of conviction under the indictment and remand that accusation to the district court for a new trial.' "

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> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

III.

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT THE DEFENDANT HAD FORGED OR UTTERED THE CHECKS?

The evidence was insufficient to show that the defendant forged the two checks mentioned in the Indictment, in that the defendant did not take the witness stand in his own behalf and deny it, and there is only circumstantial evidence—and that is, his depositing them—against him that he forged these checks. This certainly is not any sort of proof. Further the defendant was denied equal protection by the failure of the government to supply him with an independent handwriting expert.

IV.

DOES THE CONVICTION OF FORGERY AND UTTERING CONSTITUTE DOUBLE PUNISHMENT FOR THE SAME OFFENSE?

It would appear that the punishment of the defendant for the crimes of forgery and uttering, which appear to arise out of the same double punishment and would violate the Eighth Amendment to the Constitution of the United States and would be cruel and inhuman punishment. The said *Eighth Amendment* states:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and inhuman punishment inflicted."

In the case of *Trop v. Dulles*, 356 U.S. 86, 100, the court held that *banishment* was "cruel and inhuman", stating, "while the State has the power to punish, the Amendment stands to assure that this right be exercised

within the limits of civilized standards." Although Congress is awarded the greatest discretion possible in a case of penal action . . . the final judgment as to whether the punishment exceeds Constitutional limits is a judicial matter.

See also *Weems v. United States,* 317 U.S. 349-379.

Therefore, it would appear under the facts and the aforementioned cases that the conviction of "uttering" constitutes a double punishment if we also convict the defendant of forgery. Therefore we should reverse the conviction of uttering, and we request that the conviction of uttering be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed for either or all of the foregoing reasons.

Respectfully submitted,

MALCOLM H. MACKEY
Counsel for Petitioner

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